

0074-0818

24 April 1974

MEMORANDUM FOR:



OLC

STATINTL

SUBJECT : Justice Efforts on S. 2543

1. I met this morning with Mr. Robert L. Saloschin of the Department of Justice in order to be brought up to date on progress concerning S. 2543. He advised that there has been some progress but some problems and need for compromise remain. The Justice people have met with Mr. Sussman, who is Senator Kennedy's staff man on this matter. In consequence, the provisions concerning in camera inspection have been revised as in the attached, and Mr. Saloschin believes the revision may be acceptable to Mr. Sussman and is probably the best that can be done at this stage. The revision reflects some of our comments, including the concern that it was directed only to "classified" documents, for which Mr. Saloschin expressed gratitude. It does not include our request for revision to exclude from in camera inspection documents withheld pursuant to statute (Exemption 3 withholdings and, under the bill, some Exemption 1 withholdings). He explained that in camera inspection under Exemption 3 is available under current law. Therefore, bringing the review of documents withheld pursuant to statute into the protective provisions contemplated by the Justice Item (ii) appears to be an improvement over existing law. Mr. Saloschin noted incidentally, that it is clear from the cases that inspection by other than in camera proceedings is inappropriate with respect to any of the nine exemptions.

2. Mr. Saloschin believes Mr. Sussman has withdrawn his initial objection to the last sentence of the proposed Item (ii) upon being advised that law clerks are not security cleared. I believe we could live with a lesser protection in this area but I did not mention that.

3. Mr. Sussman is so adamant that there must be provisions for penalties against officers and employees who improperly withhold that Justice has not suggested to him any language to improve in this area. Justice does hope to accomplish some progress in this regard, perhaps with other staff members or senators.

DOJ review(s) completed.

CRC, 4/15/2003

4. Mr. Saloschin agrees that the strict and inflexible time limits of the bill are serious. He believes some improvement and compromise is likely but he has no hope for other than some improvement. He believes the departments are going to have to adjust their practices, top managements will have to become involved, and necessary resources will have to be allocated.

5. Mr. Saloschin does not feel that Justice could go forward with the proposal in line with the one forwarded by my letter of 17 April to amend the bill so that names of CIA, NSA and DIA employees who make withholding decisions would not have to be named. He thought this Agency, or perhaps all agencies concerned, could seek such an amendment, but only on a showing that the agencies cannot, by adjustment of their own procedures, resolve the problem. My own feeling is that we could resolve it and we need not push the request. Under present practices, withholding decisions made at the CIA appeal level are made by the CIA committee, which consists of a few senior overt officials whose names could be furnished, as required by the bill. Our initial decisions are made by various components, or indeed employees of various components, some of whom undoubtedly are under cover and should not be identified. I should think it would not be difficult, and might be desirable for other reasons, to modify our practices so that withholding decisions are made only by personnel whose names could be made public.

6. Mr. Saloschin advised he understands Senator Kennedy is due back on the 29th and he believes the Committee will meet very shortly thereafter to work on the bill.

STATINTL

Associate General Counsel

Attachment

/Received from Justice on 24 April⁷

(Suggested Amendment to S. 2543)

In Camera Inspection and First Exemption (II, B)

On page 3, line 9, insert after "(B)" the designation "(i)", and in line 19, after the word "exemptions" add the following: "except exemption (1)".

On page 3, between lines 21 and 22, add the following provision:

"(ii) In deciding whether a document is covered by exemption (1) in subsection (b) of this section, a court may request affidavits and other information other than the document in issue to be submitted. If the court is unable to resolve the matter on this basis, it may review the contested document in camera. Upon completion of that review, the court, if it tentatively determines the withholding of such document to be without a reasonable basis under the criteria established by a statute or Executive order referred to in Exemption (1), shall order the agency to explain ex parte either by oral testimony, further affidavits, or other means, the basis for such withholding. If the court then determines that the document was withheld without a reasonable basis under such criteria, it may order the document released to the plaintiff. Decisions of the trial court are appealable and

the appellate court shall consider the matter de novo, following the procedures set forth above for district court determinations. During the pendency of any such appeal the agency is entitled to a protective order sealing the documents in issue and supporting material submitted ex parte. Upon a decision, all documents in issue and copies thereof, except to the extent made available to the plaintiff, and any material submitted ex parte including transcripts thereof, shall be returned by the court to the agency. In performing functions under this paragraph, functions of the court involving the review of documents withheld under exemption (1) and of explanatory material submitted ex parte shall be performed only by the judges to whom the case is assigned."

(Note: The FBI has informally advised us that law clerks are generally not given security clearances. It can be assumed the same would be true of special masters and other court personnel.)